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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 770

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

Petitioner,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

BRIEF ON BEHALF OF THE RESPONDENT, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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THE COURT PRESS, N. Y. C.

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I

Opinions of the Courts Below

The opinion of Judge Galston of the United States District Court for the Eastern District of New York ordering judgment for defendant* is not officially reported but appears in the record on appeal at pages 143 to 148.

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* Petitioner and respondent will hereafter be referred to as plaintiff and defendant, respectively.

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit affirming the judgment for defendant is officially reported in 220 F. 2d 279, and appears in the Appendix to the Petition for Certiorari at page 1.

The opinion of the United States Court of Appeals for the Second Circuit ordering judgment for the defendant after the first trial and appeal of the above-entitled case is officially reported in 194 F. 2d 194. This Court refused to review the merits and limited its review to a procedural question (343 U. S. 975), and ordered a new trial owing to procedural failures concerning compliance with Rule 50(b) of the Rules of Civil Procedure (344 U. S. 48).

II

Jurisdiction

Plaintiff alleges jurisdiction of this Court under 28 U. S. C. § 1254 (1). The judgment of the Court of Appeals sought to be reviewed was rendered on February 7, 1955. The action was brought under the Jones Act, 46 U. S. C. § 688.

III

Question Presented

Should this Court review the evidence to determine whether the Court of Appeals for the Second Circuit correctly affirmed the decision of the District Court that plaintiff failed to prove that defendant's negligence caused the death of plaintiff's intestate, where this Court refused to review a similar decision of the Court of Appeals after the first trial and appeal of this action?

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IV

The Facts

(a)

The Background

Johnson prior to his death on Monday, April 22, 1946 had worked for defendant for about 9 or 10 years (50, 82).* He was then 41 years old (92). He was a floatman (50). He was an experienced man, qualified in his job (46, 63). He was known to be a good swimmer (46, 63).

He reported for work on tug Transfer 10 at Pier 39, Manhattan in the East River about 4:30 p. m. on April 22 (13). Also on board were Captain O'Brien, first mate Gaglio, second mate Santalesa, and, below decks, an engineer, fireman and oiler (13, 14, 49, 66). Santalesa died several years before trial (14, 50). The engine crew stayed below at all times (66).

O'Brien had worked regularly with Johnson for a few months (10, 49). O'Brien had held a master's license and captained tugs for defendant since 1932, and had been in marine work since 1924 (62, 63). Gaglio had worked in defendant's employ for 14 years and off and on with Johnson for four years (10).

Transfer 10 first took a loaded carfloat across the East River from Pier 39, Manhattan to Float Bridge 5 in defendant's railroad yard at Oak Point in The Bronx (13, 14). Johnson took part in this move, doing his regular duties (15).

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* Numbers in parentheses refer to pages of the Transcript of Record, unless otherwise indicated.

After leaving the carfloat at Bridge 5, Transfer 10 went to the Hole to await orders, and Johnson went to the shore office to deliver records (18, 50). Bridges 1 through 5 lie west of the Hole, and Bridges 10, 11 and 12 lie east of the Hole (14, 19, 43). Johnson delivered his floatman's records and then rejoined the tug with orders (18, 50).

The orders received by Transfer 10 were to take a pair of light carfloats from Bridges 11 and 12 to Pier 3 at the Church E. Gates Dock (18-20). This was a distance of a few hundred feet (19). Carfloat 53 was in Bridge 11 and Carfloat 58 in Bridge 12, both being bow in and stern out (19, 20, 23).

The carfloats were about 340 feet long and 50 to 60 feet wide (19). Between the carfloats was a short rack or pin about 50 to 60 feet long (19, 41, 52). Beyond the outer side of each carfloat was a long rack extending out about 230 to 250 feet (55).

Each carfloat was secured to the short rack by a line near its bow and to the nearest long rack by a line much nearer its stern (22, 23, 32, 34, 35, 55, Ex. 1, Ex. 2). All of these lines belonged on the racks when not in use and did not belong to the carfloats (31, 32, 48). Usually the floatman standing on the carfloat releases each short rack line by untying one from a cleat or bitt on one carfloat, going off the carfloat around back of the short rack, and then untying the other from a cleat or bitt on the other carfloat, and a bridgeman on the long rack flips the long rack lines off the carfloats (21, 30-32, 35, 51-52, 63). In the absence of a bridgeman, the floatman would release the long rack lines (21, 35). It was no part of a bridgeman's duty to leave the bridges, go down onto the floats, and unfasten the short rack lines (65). A bridgeman sometimes calls out "all gone on the port" or "all gone on the

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starboard," but he is not in a position to see if all the lines are released and normally leaves the area before they are (67).

When all these lines have been released, the words "all gone" are shouted to the captain to show that all the lines are gone or released and the carfloats are ready to be moved (65, 67). This is the general harbor practice, the practice of the defendant, and that of Captain O'Brien (64, 105-106, 111-112, 114-115). The captain then sounds his slip whistle and then starts to pull the carfloats out (65). The floatman stays on the bow of the carfloat in order to fasten the bows of the carfloats together later by cross lines (41). The mate stands by the bow of the tug to shift the tow line (35-36).

(b)

The Incident

After Transfer 10 went from the Hole to Bridge 11, Gaglio jumped onto Carfloat 53 and secured the tug's bow by a line to a bitt near the stern port corner of Carfloat 53 in Bridge 11 (20, 27, 51). Johnson followed Gaglio off the tug and was last seen by Gaglio about 40 to 50 feet away on Carfloat 53 heading up the port side towards its bow and by O'Brien on the same course about 160 feet from the tug, half way up the side of the carfloat (20-22, 29, 52). After Transfer 10 had pushed the sterns of the two carfloats together, Gaglio secured them by a line placed on bitts about 20 to 30 feet in from the end of the carfloats (21, 30, 38-39, 51). Gaglio then stood by on the carfloat at the tug's bow ready to unfasten the tug's tow line and shift it along Carfloat 53 so it could be pulled out properly (35-36).

The weather was clear, the visibility was good, and there was still daylight (45, 48, 53, 59). The tide was ebbing (59, 93). Captain O'Brien was in the tug's glass-enclosed pilot house, the floor of which was 10 to 12 feet above the tug's deck, and two or three windows of which were open (52). Neither O'Brien nor Gaglio could see the port bow corner of Carfloat 58 where the short rack line had to be released, since the short rack blocked their view (23-24, 53).

Both O'Brien and Gaglio heard the "all gone" signal come from the bow of Carfloat 58, but they could not then or normally at that distance of about 350 feet state positively that it was Johnson's voice which they heard (35, 53, 65). O'Brien checked the signal to be sure he heard it right and got it back again (53, 65). Gaglio was not sure if he heard it once or twice (41). Neither of them saw Johnson leave Carfloat 53 (21, 52). Nor was any bridgeman seen (32). Nor was there any testimony as to who removed the long rack lines, so it cannot be said that Johnson didn't. When O'Brien received the "all gone" signal, he could see that all the lines were clear except the short rack line to Carfloat 58, which was hidden by the short rack (64). Although the signal was plainly audible, no one called out not to proceed or to wait. It was Johnson's not the bridgeman's duty to release that short rack line and give the signal, and the bridgeman was not supposed to be on the carfloat where that line was to be released (21, 30, 65). The signal O'Brien got appeared to come from the apron of Bridge 12 where Johnson was supposed to be (65).

After O'Brien determined from the "all gone" signal that the carfloats were ready to be pulled out, Gaglio shifted the tug's tow line and then O'Brien sounded a slip whistle as notice to every one that the floats were about to move, and then commenced to pull them out (35-36, 65).

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They came out smoothly without any trouble (64). It was later found out that the short rack line to Carfloat 58 had in fact been unloosened and placed on the rack, and was not rended or damaged (44, 48). The short rack line was not found "hanging from the rack", as stated on page 10 of the petition.

The petition states on page 6 that the tug was started back before the "all gone" signal was received. That this happened was specifically denied by Gaglio, and plaintiff is attempting to rely on an allegedly prior contradictory statement not received in evidence (39-40), and usable only to discredit rather than as affirmative proof even if it had been received.

It was Johnson's duty to stay at the port bow of Carfloat 58 as the carfloats were pulled out until their bows came together and he could secure them with a line (40-41).

In this position Johnson could not be seen by O'Brien after until after Carfloat 58 cleared the end of the short rack (23-24, 52, 64). O'Brien had to watch for river traffic as he pulled out and tend to his maneuver (52, 65). O'Brien first noticed that Johnson apparently was not aboard when he had backed out into the river and was about to push the carfloats forward (54). Floatmen sometimes stay ashore to correct a record or for some other purpose, and the move could easily be made without one (66). He then asked Gaglio where Johnson was but Gaglio did not know (41, 54). O'Brien then had Gaglio secure the bow cross lines (41, 54). O'Brien had no knowledge then of anything happening to Johnson (54).

At no time while the carfloats were being moved was anything unusual or any commotion heard or seen, or was any shouting, call for help or call of any kind or noise heard (46-47, 65-66). Nothing was seen in the float bridges as Transfer 10 passed them (47, 66). There was a stair

on each side of the apron of Float Bridges 11 and 12 leading down into the water, and a person in the water could get up these stairs at any stage of the tide or walk ashore under the float bridges (Ex. A, 63-64).

After Carfloats 53 and 58 had been left at Pier 3, Church E. Gates' Dock, Transfer 10 returned to the Hole (43).

Coming into the Hole, Transfer 10 sounded three short whistles as a signal for Johnson to return (43, 60-61). When Johnson did not appear, O'Brien sent Gaglio to look for him (43, 61). Gaglio looked in the bridgemaster's office, the locker room, and the rope shanty (43-44). Gaglio reported back to O'Brien that he could not find Johnson, and O'Brien told Gaglio to look around the float bridges (44, 61). Gaglio discovered something floating in Bridge 12 and reported this to O'Brien (44). O'Brien directed Gaglio to go get a boat hook and line, and together they then went to Bridge 12 (45). The bridge was lowered and they hauled from the water what turned out to be Johnson, who was floating about 18 feet from the apron near the short rack (44-45).

Prolonged attempts at artificial respiration produced no response from Johnson, who was placed face down on the bridge apron (49, 66). There was something like spittle on his lips, but no water was gotten out of him (47, 66). Both O'Brien and Gaglio looked closely at Johnson but saw no blood, cuts, bruises or other marks on him and felt no broken bones (47, 66). Johnson was removed to the morgue (86, Ex. 8). Later, at the funeral parlor, Mrs. Johnson, her daughter Audrey and son Charles noticed a scrape mark on Johnson's forehead (83, 89, 90).

Mrs. Johnson testified that her husband had never been in a hospital or had any serious illness (81). She further claimed he had never been away from his job with defend-

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ant on account of illness (86). She later admitted, however, that he may have been away from his job for a while on account of a hernia (87). She denied having written a letter dated May 31, 1943, signed with her name, stating that her husband had not been feeling well for several weeks owing to stomach trouble, had been advised by a doctor to rest for several weeks, and had gone to her sister's in the mountains, but claimed her sister wrote the letter (86, Ex. B).

(c)

Custom and Practice

Captain O'Brien testified that the way he took the two carfloats out of Bridges 11 and 12 was the same way that he had done it for 19 years and that this was the practice on the New Haven Railroad (64). His custom was to make sure all lines were off the carfloats before attempting to move them, and he did this by looking at the lines and by waiting for the "all gone" signal (64-65). "All gone" means that all lines have been released (65, 67). After receiving the "all gone" signal his regular practice was to sound his slip whistle as notice that the carfloats were about to move and then to pull them out gradually (64, 65). He could not normally identify the voice of the person who called "all gone", unless he could see him, because the person was usually too far away (53, 65).

Johnson had worked as a New Haven Railroad floatman for 9 or 10 years and had worked with O'Brien regularly for a few months prior to his accident and also on other occasions, so that he was familiar with the practice (10, 49, 50, 82).

Captain Crosson, called as an expert by plaintiff, claimed that the custom and practice of the Pennsylvania Railroad

in New York Harbor was for the captain before moving his carfloats to send the mate onto the carfloat in the position of Carfloat 58 to observe the floatman and relay the "all gone" signal to the captain and then return to the tug before it started to move (69-70, 80). If cars are on the carfloats or at night, he may have to send a man all the way up to the bow of a carfloat 300 feet or more to see the floatman and then await the man's return and no longer know where the floatman is when the tug starts (78-80).

Crosson had been a captain with the Pennsylvania Railroad for about 40 years until 1944 when he retired (68, 74). His experience as a captain was limited to his service with the Pennsylvania (74).

Captains Hansen, Tursic, and King, called as experts by defendant, asserted that the custom and practice in New York Harbor was to do what O'Brien did rather than what Crosson claimed (104-106, 110-112, 114-115). Hansen was a captain for the Hudson Tow Boat Company and then for 37 years for the Central Railroad of New Jersey (104). Tursic was a captain for the Delaware, Lackawanna & Western Railroad and earlier for the Erie Railroad for 30 years (110). King was a captain for the Pennsylvania Railroad for 40 years (114). All three were familiar with the custom and practice throughout New York Harbor (104, 110, 114-115).

(d)

Oil

Gaglio saw no oil on Carfloat 53 when he first jumped aboard at the stern port quarter (24, 26-27, 46). Later on when he went forward to secure the bow cross lines after the carfloats had been pulled out he noted a film of oil about 20 to 25 feet in diameter along the c[illegible]ter line start-

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ing about 50 feet from the stern (26, 28-30). The carfloat was 50 to 60 feet wide (19). Johnson had walked up the port side of the carfloat and there was no oil where he walked (22, 27-30, 64). He had no reason in daylight to walk through oil which he could easily avoid. He was not observed to slip or fall as he jumped down and walked along the carfloat (46, 64). There was dirt and coal dust on the deck of the carfloat (46). O'Brien's testimony substantially confirmed Gaglio's (60, 64).

Plaintiff's petition repeatedly states that Carfloat 53 was saturated with oil (pp. 6, 7, 9). There was no testimony so stating. The only reference of this kind was to an allegedly contradictory prior unsworn statement by Gaglio that the stern of Carfloat 53 was saturated with oil (25-26). This statement may be used to discredit the witness but not as affirmative proof.

There was no testimony of any kind to show how long the oil or the carfloats had been there, and there was no testimony as to the source of the oil other than speculation that it came from steel shavings in a freight car if such a car had been on the carfloat and had dripped oil (60).

POINT I

The judgment below may be sustained on the ground that plaintiff produced no proper proof by a qualified expert of any common custom or practice in New York Harbor known to defendant.

The judgment for defendant may be sustained on the ground that plaintiff failed to prove that the alleged negligent custom or practice on which her claim was based existed and was known to defendant. This point was presented to, but not ruled on, by the courts below.

Plaintiff's expert Crosson, contrary to her expert at the first trial, was qualified only as to the practices of the Pennsylvania Railroad. The practice of one other railroad is not competent proof on the issue of whether defendant's practice was negligent.

> *Johnson* v. *New York, New Haven & Hartford R. Co.*, 194 F. 2d 194 (2d Cir. 1952);
> *Petition of Highlands Navigation Co.*, 29 F. 2d 37 (C. C. A. 2, 1928);
> *Willis* v. *Penn. R. Co.*, 122 F. 2d 248 (C. C. A. 2, 1941), cert. den. 314 U. S. 684.

Crosson's testimony does not show that the practice described by him was in fact uniformly followed on other railroads, that any definite practice was established on other railroads, and that the circumstances under which it was practiced were similar to those in the case at bar.

In *McClellan* v. *Penn. R. Co.*, 62 F. 2d 61 (C. C. A. 2, 1932), the court said (p. 63):

> "Proof of a custom cannot be said to be enough to submit that issue to the jury unless there is substantial evidence to show that what is called custom amounts to a definite, uniform, and known practice under certain, definite, and uniform circumstances."

Furthermore, there was no proof that defendant had any knowledge of the practice described by Crosson.

In *Miller* v. *The Sultana*, 176 F. 2d 203 (2d Cir. 1949), cert. den. 338 U. S. 907, it was held that a ship may not be held negligent for failure to follow a local custom or practice unless knowledge of the custom or practice was brought home to it.

POINT II

The judgment below may be sustained on the ground that plaintiff failed to prove that defendant's negligence was the cause of Johnson's death.

There is no evidence to show how or when Johnson died or where he was for about a half hour. It was not unusual for a floatman to stay ashore on a short shifting move, as it could easily be done without him. The fact that neither O'Brien nor Gaglio heard any calls or noise or saw any one in the water as they passed close by Bridge 12 makes it unreasonable to infer that Johnson fell off Carfloat 58 into the water, or at least that he was conscious when or shortly after he did so. No mark was found on him by them to indicate that any blow rendered him unconscious before he fell into the water, and presumably he would have shouted when he started to fall before he struck anything. The scrape mark on his forehead mentioned by his wife, son and daughter as having been noticed at the funeral parlor was no proof of a serious blow and undoubtedly occurred as he was lying face down on the rough dock being given artificial respiration or at the morgue or at the funeral parlor. One is obliged to assume that he did not fall into the water when Carfloat 58 was there or that if he did he suffered something like a heart attack or brain hemorrhage which silenced him before he entered the water. Had he been conscious, he was a good swimmer and could have waded out or walked up the nearby stairs. He had been seriously ill in 1943 and 1944 and may have had a recurrence. No water was drawn from his lungs by artificial respiration, presumably because unconsciousness prevented him from swallowing any.

Even under the assumption that Johnson fell into the water from Carfloat 58 and was silenced by a blow to the

head as he fell, there was still no evidence that any negligence on the part of defendant caused him to fall. No one can say whether he tried to jump ashore as the float started to move, whether he stumbled over something, or what happened. Since he was the only person known to be in the vicinity and there was no reason for any bridgeman to be around after the release earlier of the long rack lines, and since no other lines remained to be released when the "all gone" was heard and since it was his duty and no one else's to be on the port bow of Carfloat 58 releasing the short rack line, to give the "all gone" signal and to stay there after releasing the line, and since the line could only be released from the carfloat and was in fact released, one can assume only that in fact he was there, released the line and then gave the "all gone" signal. That was the only thing the "all gone" signal could mean. No one but Johnson was in a position to know that all the lines were released.

Being an experienced man who had worked with O'Brien for several months and also on other occasions, he could expect the carfloat to move fairly soon after he gave the signal and he knew that O'Brien could not see him. If for any reason he was not ready for the carfloat to move, he would not have given the "all gone" signal or, knowing O'Brien could not see him, he would have called out for the tug to wait. Even if he did not give the "all gone" signal, he must have heard it and could have called out if for any reason he was not ready for the carfloat to move. But there is no reason to believe that any one could see that the short rack line was released and not see that Johnson, who was right next to it, was unprepared for the "all gone" signal, and that such a person would give the signal knowing of Johnson's unpreparedness.

Even under the assumption that Johnson did not give the "all gone" signal and fell from Carfloat 58 into the water, there is no proof as to whether the fall resulted

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from his own carelessness, from that of defendant, or from purely accidental causes, nor is there any proof to show that observation by O'Brien of the custom described by Crosson would have prevented the accident, since Gaglio would have returned to shift the tug's bow line prior to the tug's moving and would no longer have had Johnson under observation. In fact, the possible assumptions in this case are numerous, and before one could attribute Johnson's death to defendant's negligence, one would have to build inference upon inference, without any proper foundation in the evidence, as to an issue on which the burden of proof rested with plaintiff.

A case virtually identical with the case at bar is *Lapp* v. *Penn. R. Co.*, 51 F. 2d 477 (C. C. A. 3, 1931). There decedent Lapp on a dark winter night was acting as mate on a tug in the North River near Hoboken, New Jersey. The move was to pull a certain loaded carfloat out so as to be able to reach another carfloat. Decedent's job was to release the bow lines of the first float, then to call "all gone," and later to signal to the tug when the float had cleared the dock. Another member of the crew heard a scream and felt a lurch as the float was starting to be pulled back, but heard no "all gone" signal. Decedent's cap was found floating in the water and his body was recovered later. There was ice on the deck of the float on its sides and between the cars. A nonsuit of plaintiff was affirmed on the ground that the cause of the accident rested in speculation, being either the premature start, slipping on ice, or the jarring of the float, with insufficient evidence to support any particular theory in the absence of any eyewitness to decedent's fall.

It has long been held that a jury may not decide cases on the basis of surmise and conjecture, and may not select one from several possible plausible causes.

Patton v. *Tex. & Pac. Ry. Co.*, 179 U. S. 658 (1901);

N. Y. Central R. Co. v. *Ambrose*, 280 U. S. 486 (1930);
Penn. R. Co. v. *Chamberlain*, 288 U. S. 333 (1933).

In the case of *Moore* v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 (1951), this Court upheld for failure to prove negligence the setting aside of a verdict for plaintiff in a suit under the Federal Employers' Liability Act to recover damages for an employee's death. This Court pointed out that even if the jury disbelieved the testimony of defendant's eyewitness as to how decedent fell from the engine, this merely left the jury with no evidence as to how he fell, and under such circumstances it could not infer that he fell because of defendant's negligent operation of the engine. "This would be speculation run riot. Speculation cannot supply the place of proof" (p. 578).

In numerous railroad cases involving employees who fell into the water or under trains without eyewitnesses to establish the cause of their deaths, the complaint has been dismissed or a defendant's verdict directed for failure to establish that defendant's negligence caused the death.

Northwestern Pac. R. Co. v. *Bobo*, 290 U. S. 499 (1934);
Atchison, T. & S. F. Ry. Co. v. *Saxon*, 284 U. S. 458 (1932);
Atchison, T. & S. F. Ry. Co. v. *Toops*, 281 U. S. 351 (1930);
Chicago, M. & St. P. Ry. Co. v. *Coogan*, 271 U. S. 472 (1926).

Recent cases follow the same principles.

In *Boston & M. R. Co.* v. *Coppellotti*, 167 F. 2d 201 (C. C. A. 1, 1948), a jury verdict in favor of decedent's

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administrator in an action under the Federal Employers' Liability Act was declared to be based solely on conjecture and speculation where a track laborer was seen to walk away from the track he was repairing with 100 other men and an hour later was found run over by a train on the adjacent track. Although the laborer had not specifically been warned that trains might move in either direction on the adjacent track, four had come east and five west prior to his accident, and there was no proof that this failure to warn him or that some negligence on the part of the engineer of the train which struck him, rather than his own carelessness, was the cause of his death.

In *Trust Co. of Chicago* v. *Erie R. Co.*, 165 F. 2d 806 (C. C. A. 7, 1948), cert. den. 334 U. S. 845, decedent was a section hand foreman with two men working under him. They last saw him walking toward a track on which a train was standing. They then went into a tool house and ate lunch. They heard no trains move and no train bells or whistles. Ten minutes later one of them left the tool house, walked about 100 feet, and found decedent dead on the track and the train gone. Direction of a verdict for defendant in a suit under the Federal Employers' Liability Act was upheld. The court said (p. 809):

> "One can speculate on how the accident happened, but where is the evidence as to how it did happen? Where is the evidence from which a reasonable inference could be drawn as to how it happened? Many reasonable hypotheses as to how the accident happened may be conjured up, but it is not reasonable hypotheses we are interested in, but evidence from which reasonable inferences may be drawn. . . .
>
> "A jury may not speculate and formulate a plausible theory as to where the accident happened and how it happened, and then speculate on what it was

that the defendant did that was negligent and caused the accident."

Other recent cases with somewhat similar facts are:

Healy v. *Pennsylvania R. Co.*, 184 F. 2d 209 (3rd Cir. 1950), cert. den. 340 U. S. 935;
West v. *Eastern Transp. Co.*, 179 F. 2d 478 (4th Cir. 1950), cert. den. 340 U. S. 810.

POINT III

The judgment below may be sustained on the ground that there was no proof of negligence on defendant's part with respect to the oil on Carfloat 53 or of any causal connection between the negligence and Johnson's death.

The deck of Carfloat 53 was in sound condition but a small part of it near the center not far from the stern was temporarily covered by a film of oil 20 to 25 feet in diameter. There was no competent proof as to the origin of the oil or how long it had been there. There was no proof that defendant had actual notice of the condition, and no evidence on which to base a claim of constructive notice or of reasonable opportunity to remove the oil after notice.

It has been held in a number of recent cases under the Jones Act and the Federal Employers' Liability Act and in admiralty that no recovery on grounds of negligence or unseaworthiness may be had in cases where a fall is occasioned by the temporary presence of a foreign substance on a structurally sound place of work unless the defendant had actual or constructive notice and reasonable opportunity to remove the substance.

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Adamowski v. *Gulf Oil Corp.*, 197 F. 2d 523 (3rd Cir. 1952), affirming on opinion in 93 F. Supp. 115—a spot of oil and a ship's light bulb out in a passageway;

Shannon v. *Union Barge Line Corp.*, 194 F. 2d 584 (3rd Cir. 1952), cert. den. 344 U. S. 846—an oily spot on the deck;

Cookingham v. *United States*, 184 F. 2d 213 (3rd Cir. 1950), cert. den. 340 U. S. 935—Jello on a stairway of a ship;

Miller v. *The Sultana*, 176 F. 2d 203 (2d Cir. 1949), cert. den. 338 U. S. 907—an unidentified object in a passageway next to an open hatch of a ship;

Guerrini v. *United States*, 167 F. 2d 352 (2d Cir. 1948), cert. den. 335 U. S. 843—a patch of grease on the deck near an open hatch of a ship;

Boyce v. *Seas Shipping Co.*, 152 F. 2d 658 (C. C. A. 2, 1945)—a greasy floor of a ship's pantry.

There is not the barest shred of evidence to show that Johnson ever touched any part of the oil. He had no reason to go through it in broad daylight when he could easily avoid it. The two witnesses who saw him said he did not go near it but went up the port side of Carfloat 53. He was not observed to fall or slip as he jumped onto the float and walked toward the bow. There was no proof of any oil being found on his shoes or on the bow of Carfloat 58. One is asked to believe that Johnson deliberately went out of his way and walked through the oil without wiping it off and that he slipped later after he had walked more than 300 feet over a deck covered with dirt and coal dust, had unfastened the short rack line on Carfloat 53, had clambered around behind the short rack, had gotten down onto Carfloat 58, and had untied its short rack line.

Plaintiff attempts to enlarge the evidence in her favor by repeatedly stating that Carfloat 53 was saturated

with oil (Petition, pp. 6, 7, 9). The only testimony in the record to support such a contention was a reference on direct examination by plaintiff's attorney to an earlier unsworn statement of Gaglio which he could not recall and in which he allegedly said that the stern of Carfloat 53 was saturated with oil (25-26). Such a prior statement, if contradictory, could be used to discredit Gaglio, if the trial court in its discretion allowed plaintiff to impeach her own witness, upon a finding of surprise or hostility, but could not be used as affirmative proof of the contents of the statement.

Bridges v. *Wixon*, 326 U. S. 135 (1945);
National Labor Relations Board v. *Quest-Shon Mark B. Co.*, 185 F. 2d 285 (2d Cir. 1950), cert. dent. 342 U. S. 812;
Fitzgibbons Boiler Co. v. *National City Bank of N. Y.*, 287 N. Y. 326 (1942), rearg. den. 287 N. Y. 843;
133 A. L. R. 1454.

The same lack of evidence as to what made Johnson end up in the water as controlled the opinion of the Court of Appeals after the first trial is equally a bar to plaintiff's newest theory, and merely adds one more to the many speculations previously advanced, all being built on a series of inferences without evidentiary basis.

POINT IV

There are no reasons for granting a writ of certiorari.

The present case presents no general principle, no important federal question, and no conflict between courts for review. Only the application of well settled rules to the particular facts is involved. It is not within the proper business of this Court to review cases important to the parties but not to the operation of a federal system.

The mere fact that this action was brought under the Jones Act gives it no special standing that calls for a review. This Court has frequently denied certiorari in cases under the Federal Employers' Liability Act where the court has dismissed a plaintiff's case and taken it from a jury. Note, for example, the following:

Beamer v. *Virginian R. Co.*, 321 U. S. 763;
Cowdrick v. *Penn. R. Co.*, 323 U. S. 799;
Negro v. *Boston & Me. R.*, 324 U. S. 862;
Fantini v. *Reading Co.*, 325 U. S. 856;
Scarborough v. *Penn. R. Co.*, 326 U. S. 755;
Chisholm v. *Reading Co.*, 329 U. S. 807;
Waller v. *Northern P. T. Co.*, 329 U. S. 742;
Wolfe v. *Henwood*, 332 U. S. 773;
Lasagna v. *McCarthy*, 332 U. S. 829;
Trust Co. of Chicago v. *Erie R. Co.*, 334 U. S. 845.

Many like cases could be cited under the Jones Act, such as *Glover* v. *Compagnie Generale Transatlantique*, 308 U. S. 550; *Miller* v. *Browning S. S. Co.*, 334 U. S. 834; and *West* v. *Eastern Transp. Co.*, 340 U. S. 810.

The cases cited by plaintiff are merely cases in which on their particular facts it was held that a jury question was presented. On the unique facts of the case at bar,

no such question can be found as to the issues heretofore discussed. There was no conflict in the testimony for the jury to resolve, as the basic story of what happened was not disputed.

There is not the slightest evidence that the courts below were in any way influenced by the fact that after the first trial and appeal of this case review was limited by this Court to procedural questions only and no review of the merits was granted. Plaintiff's argument based on this assumption is therefore groundless.

Nor is there the faintest indication that the Court of Appeals on the second appeal felt itself bound by its determination of the first appeal and failed to review the additional evidence adduced at the second trial. On the contrary, it is clear from reading the opinion of the trial judge, which the Court of Appeals adopted, that the additional evidence was examined carefully and found insufficient to change the original determination of the Court of Appeals.

Plaintiff has now had two full trials and two complete appellate reviews of the merits. Further review is unwarranted, and appears to be requested only because plaintiff is disappointed over the outcome.

CONCLUSION

For the reasons advanced above, it is urged that this Court should refuse to grant review by writ of certiorari.

Respectfully submitted,

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